


# CITY COUNCIL AGENDA STATEMENT



NOVEMBER 17, 2009, Item 15

**ITEM TITLE:** PUBLIC HEARING: TO CONSIDER THE TERMINATION OF THE FRANCHISE AGREEMENT BETWEEN THE CITY OF CHULA VISTA AND NEXHORIZON COMMUNICATIONS INC., (NEXHORIZON) FOR FAILURE TO COMPLY WITH MATERIAL PROVISIONS OF THE FRANCHISE AGREEMENT

RESOLUTION OF THE CITY COUNCIL OF THE CITY OF CHULA VISTA DIRECTING STAFF TO COMMENCE TERMINATION OF THE NEXHORIZON FRANCHISE

**SUBMITTED BY:** DIR. OF CONSERVATION & ENVIRONMENTAL SERVICES 

**REVIEWED BY:** CITY MANAGER   
ASSISTANT CITY MANAGER 

4/5THS VOTE: YES ☐ NO ☒

## SUMMARY

NexHorizon Communications, Inc. has failed to meet certain material provisions of the Franchise Agreement, and after reasonable attempts to cure such provisions staff has executed the notice required to allow the City Council to consider possible termination of the Franchise Agreement (Attachment A). The Ordinance and Agreement require the City to provide the Franchisee with notice of the material provisions and 30 days to cure those items. Staff provided NexHorizon with that notice on August 19, 2009 (Attachment B) and has been working with NexHorizon to successfully cure some but not all the material issues for which the Franchisee has not complied. The public hearing has been set for November 17, 2009 for the City Council to review the material provisions and consider termination of the Franchise Agreement.

## ENVIRONMENTAL REVIEW

The Environmental Review Coordinator has reviewed the proposed project for compliance with the California Environmental Quality Act (CEQA) and has determined that the project qualifies for a Class 8 categorical exemption pursuant to Section 153218 [Actions by Regulatory Agencies for Lease Permit or Agreement] of the State CEQA Guidelines. Thus, no further environmental review is necessary.

## **RECOMMENDATION**

City Council adopt the resolution, review the status of NexHorizon's commitments under the Franchise Agreement and August 19, 2009 Notice of Violation, and consider termination for failure to meet certain material provisions of the Franchise Agreement.

## **BOARDS/COMMISSION RECOMMENDATION**

Not Applicable

## **DISCUSSION**

On May 20, 2008, the City Council approved the assignment of the Chula Vista Cable Franchise Agreement, to NexHorizon. Pursuant to the terms of that assignment, NexHorizon assumed all of the obligations of the Franchise Agreement, and agreed to comply with and be bound by the terms and conditions of the Franchise Agreement. Since that time, the City staff has become aware that NexHorizon has failed to comply with certain material provisions of the Franchise Agreement.

Section 3.c. of the Franchise Agreement provides, in pertinent part:

"The Franchise may be terminated at any time by the City Council in the event the Council shall have found, after notice and hearing, that:

- (1) The Grantee fails to comply with any material provision of this Agreement; however, termination proceedings shall only be commenced in a public meeting affording due process, if, after thirty (30) days from written notification from the City stating with particularity the grounds upon which the City relies, Grantee fails to correct stated violation. In the event the stated violation is not reasonably curable within thirty (30) days, termination proceedings shall not be commenced if the Grantee provides, within the said thirty (30) days, a plan, satisfactory to the City Manager to remedy the violation and continues to demonstrate good faith in seeking to correct said violation."

In accordance with Section 3.c., on or about August 19, 2009 staff provided NexHorizon Inc., with a detailed list of the material provisions within the Franchise Agreement that NexHorizon has failed to comply with (Attachment B). Staff is working diligently with NexHorizon to provide them with every reasonable opportunity to cure those provisions and meet their obligation under the Franchise Agreement prior to the proposed public hearing. The Agreement and Municipal Code provide for 30 days to cure the issues and additional time when the Franchisee has demonstrated a plan to cure issues that cannot be cured within the 30 day period. Staff has worked closely with NexHorizon over the past year and extensively over the past 92 days since the official notice of failure to meet certain material provisions of the Agreement was delivered to NexHorizon. If NexHorizon fails to meet their obligations as prescribed in the Agreement, staff will be prepared at the public hearing to provide the City Council with an update of the status of their efforts.

### **DECISION MAKER CONFLICT**

Staff has determined that the recommendations requiring Council action are not site-specific and consequently the 500-foot rule found in California Code of Regulations section 18704.2(a)(1) is not applicable to this decision.

### **CURRENT YEAR FISCAL IMPACT**

The City has not received Franchise Fee or Utility User's Tax payments for the current fiscal year and the total payments are estimated to be approximately \$60,000. Additionally, staff has invested resources in the development and bid implementation process for two (2) 20a utility undergrounding projects. These costs for these projects are recoverable through an allocation pursuant to the Public Utilities Commission and funded by local ratepayers. The projects represent a value to the citizens of Chula Vista and to the extent the projects are not completed, costs increase or are duplicated by failure of the Franchisee to meet the obligations in a timely fashion, the City would either absorb those costs or the project would not be completed and the community would not receive the benefit of their investment.

### **ONGOING FISCAL IMPACT**

The Franchise Agreement contains mutual benefits to the Franchisee, ratepayers and City of Chula Vista which would not be realized if the Franchisee fails in their obligation and the Franchise is terminated. Those include the payment of an estimated \$60,000 per year in Franchise Fee and Utility User's Tax that fund public services, in-kind support and telecommunications support that contribute to the cost effective operation of the City. The Franchise Fees and Utility User's tax would be paid by AT&T or Cox Communications if the estimated 1,500 current NexHorizon cable, telephone and internet customers migrated to AT&T or Cox Communications for their service. These customers also have the option of transitioning to satellite television service which is not currently required to pay the Franchise Fee for television service.

### **ATTACHMENTS**

- A. Public Hearing Notice
- B. Thirty-day notice to cure to the Franchisee

*Prepared by: Michael T. Meacham, Director, Conservation & Environmental Services*

NOTICE OF PUBLIC HEARING  
BY THE CITY COUNCIL  
OF THE CITY OF CHULA VISTA, CALIFORNIA

ATTACHMENT A

NOTICE IS HEREBY GIVEN THAT A PUBLIC HEARING WILL BE HELD BY THE CITY COUNCIL of the City of Chula Vista, CA, in City Council Chambers located in the City Hall Building, Chula Vista Civic Center, 276 Fourth Avenue, Chula Vista to consider the following project:

**CONSIDERATION DATE:** November 17, 2009  
**LOCATION/TIME:** 276 Fourth Avenue, Chula Vista/4:00 p.m.  
**DESCRIPTION:** Notice of Violations of Franchise Agreement - NexHorizon Communications, Inc. and Potential Termination of the Franchise as a Result of the Violations

The City Council of the City of Chula Vista will conduct a Public Hearing to consider violations of the Franchise Agreement between the City of Chula Vista and NexHorizon Communications, Inc. (NexHorizon). The Council may determine to take action, up to and including termination proceedings for failure to comply with material provisions of the Franchise Agreement.

The City previously provided NexHorizon with a written notice stating the particular grounds that the City is relying on in considering possible termination of the franchise. A copy of that letter is on file in the office of the City Clerk, and available to the public.

Any written comments or petitions to be submitted to the City Council in connection with this matter must be received in the Conservation and Environmental Services Department no later than noon on the date of the hearing. Please direct any questions or comments to the Conservation Director, **Michael Meacham**, in the Conservation and Environmental Services Department, Public Services Building 300, Chula Vista Civic Center, 276 Fourth Avenue, Chula Vista, CA 91910, or by calling (619) 409-5870.

If you wish to challenge the City's action on this application in court, you may be limited to raising only those issues you or someone else raised at the public hearing, or in written correspondence delivered to the Conservation and Environmental Services Department at or prior to the public hearing described in this notice.

**COMPLIANCE WITH AMERICANS WITH DISABILITIES ACT (ADA)**

The City of Chula Vista, in complying with the American With Disabilities Act, requests individuals who require special accommodation to access, attend and/or participate in a City meeting, activity or service request such accommodation at least 48 hours in advance, for meetings, and 5 days for scheduled services and activities. Please contact Diana Vargas for specific information at (619) 691-5101. Service for the hearing impaired is available at 585-5647 (TDD).

Calvin D. Smiley, Chairman/CEO  
NexHorizon Communications Inc.,  
9737 Wadsworth Parkway  
Westminster, CO 80021

August 18, 2009

RE: Notice of Violations of Franchise Agreement

Dear Mr. Smiley

This letter is sent to provide NexHorizon Communications, Inc. ("NexHorizon") notice, pursuant to Section 3.c.1 of the Franchise Agreement between the City of Chula Vista ("City") and NexHorizon that NexHorizon has failed to comply with material provisions of the Franchise Agreement. By this notice, the City is providing NexHorizon thirty days to correct the violations described below. If NexHorizon fails to do so, the City shall hold a public hearing on October 6, 2009, at 4:00 p.m., in the City Council Chambers, City Hall, Building 100, located at 276 4<sup>th</sup> Avenue, Chula Vista, California, to consider termination of the Franchise Agreement.

The specific material provisions of the Franchise Agreement which NexHorizon has violated, and the grounds on which the City is relying are as follows:

Section 5. "Franchise Payments:"

Section 5, requires NexHorizon to make specified payments to the City, so long as the Franchise Agreement is in effect. The City approved the assignment of the Franchise Agreement from Chula Vista Cable to NexHorizon on May 20, 2009. Since that time, the City has not received any payments from NexHorizon, as required by Section 5. The City's records indicate that the last payment received from Chula Vista Cable NexHorizon was \$4,920 on April 7, 2008 for the 2007 reconciliation payment. The City has no record of having received franchise fee payments or the corresponding late fees from Nexhorizon for the period from the first quarter of 2008 through June 30, 2009. With penalties and late fees we estimate that amount to be approximately \$50,000. An additional quarterly payment for 2009 is also due no later than September 30, 2009.

Section 14. "Changes Required by Public Improvements" and

Section 15. "Failure to Perform Street Work:"

These Sections of the Franchise Agreement require NexHorizon to, among other things, relocate Franchise Property below ground, at NexHorizon's expense, when required by the City Engineer. Pursuant to these provisions, the City has requested, both verbally and in writing that NexHorizon fulfill its responsibilities for participating in a trench agreement with the Utility as part of a 20a power line and utility undergrounding project. Copies of that written correspondence are attached as Exhibit 1.

Section 16. Faithful Performance Bond.

NexHorizon has not renewed and transmitted and executed bond to the City.

Section 17. Indemnification to the City

The City has not received an insurance endorsement documenting that NexHorizon has maintained the insurance limits required under the Agreement since the assignment.  
(Exhibit 2)

Section 8. "Services to City and Public Schools:"

NexHorizon has not complied with any of the requirements of this section.

Section 10. "Establishment of Service:"

NexHorizon has failed to diligently pursue installation and extensions of the Cable System to completion and plans submitted to the City for under grounding appear to eliminate service to some residential areas.

Section 11. "Location of Franchise Properties (b):"

NexHorizon has failed to place Franchise property underground in a timely manner as described under Section 14 and 15.

Section 18. Regulation of Service:

Failure to provide cable services to any group of potential cable residential subscribers because of the income of the residents of the residents of the local area in which such group resides. NexHorizon appears to have made plans to reduce their service extension as part of the transition from overhead to underground service.

Section 19. Filings and Communication with regulatory Agencies:

Failure to provide the City with a copy of any communications to State or Federal agencies at the same time such communications are submitted to the respective agencies. The City has not received an annual report or other FCC filings.

The City requests that NexHorizon immediately cure its violations of the Franchise Agreement.

Over the years the City of Chula Vista has demonstrated patience and flexibility when working with Ultronics, Chula Vista Cable and Nexhorizon to bring the potential value of a cable and communications over-builder to the City's consumers. The City is under a declared economic emergency and more than ever has a responsibility to all its citizens to protect their interests and ensure cost effective and efficient use, and proper maintenance of the Right of Way by all users. The City has worked diligently to ensure that all franchisees are working in a collaborative manner that extends their services to all citizens in as competitive a manner as possible, and does not unnecessarily add to the cost

of maintaining the right of way or their respective rates. Nexhorizon has failed to do its part to meet the intent and spirit of that Franchise Agreement, cooperate in a timely manner in planning and implementing right of way projects or

communicate resolution of those issues effectively with the City. It is for those reasons and the material provisions stated above that I am compelled to send this 30 day notice. Please contact me immediately if you have any questions regarding how to respond to these concerns.

Sincerely,

Michael T. Meacham, Director  
Conservation & Environmental Services  
(Utility Services)  
619 409 5870  
mmeacham@ci.chula-vista.ca.us

Cc: Daniel M. Smith, Chief Financial Officer  
Jeff Vaglio, Chula Vista Office  
Scott Tulloch, Assistant City Manager  
Jill Maland, Deputy City Attorney  
Maria Kachadoorian, Finance Director  
Richard Hopkins, Public Works Director, City Engineer

October 3, 2008

File #KY078

Jeffrey T. Vaglio  
NexHorizon Communications  
(OTC BB: NXHZ)  
581 C Street  
Chula Vista, CA 91910

#### DEADLINE ON PARTICIPATION IN L STREET UNDERGROUNDING DISTRICT

As City and San Diego Gas and Electric (SDG&E) staff have discussed with you for many months, the design for the L Street Undergrounding District from Monserate Avenue to Nacion Avenue is now complete. On May 20, 2008, the Chula Vista City Council approved the assignment of the Chula Vista Cable Franchise Agreement. Since that date, the City and SDG&E have been waiting for the submittal of the Joint Trench Offer for L Street by NexHorizon. SDG&E informed the City at the beginning of August that they were ready to proceed with the construction process for the L Street District. Because the inclusion of NexHorizon's facilities would involve some design changes, waiting for NexHorizon's Joint Trench Offer has held up the construction process.

Since NexHorizon has been given ample opportunity to submit a Joint Trench offer acceptable to SDG&E, the City does not want any further delays in the construction process. Therefore, NexHorizon has seven working days from the date of this letter to submit a Joint Trench Offer acceptable to SDG&E. This includes resolution of any outstanding financial issues on the Fourth Avenue Undergrounding District that would affect SDG&E's acceptance of the Joint Trench Offer on L Street. Please work with SDG&E Governmental Liaison Planner, Dave Emerson, as quickly as you can. He may be reached at (858) 654-1136.

On the specified date of October 15, 2008, the City of Chula Vista will direct SDG&E to proceed with the construction process. If NexHorizon has not complied with the above requirements by that date, NexHorizon's facilities within the boundaries of the L Street Utility Undergrounding District may not be installed underground. Since overhead facilities within the district will be removed, this could reduce the ability of NexHorizon to serve customers within Chula Vista.

Please contact Elizabeth Chopp, Senior Civil Engineer, at (619) 691-5046 if you would like to discuss this issue.

**RICHARD A. HOPKINS**  
**CITY ENGINEER**

Cc: Calvin D. Smiley and Daniel M. Smith, NexHorizon Communications Inc., 9737 Wadsworth Parkway, Westminster CO 80021  
David J. Emerson, SDG&E, 8315 Century Park Court CP22A, San Diego CA 92123-1548  
Michael Meacham, Frank Rivera, Elizabeth Chopp  
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Jeffrey T. Vaglio  
NexHorizon Communications  
(OTC BB: NXHZ)  
581 C Street  
Chula Vista, CA 91910

FINAL NOTICE ON PARTICIPATION IN L STREET UNDERGROUNDING  
DISTRICT #134

As City of Chula Vista staff has informed you by certified mail dated October 3, 2008 and by e-mail dated December 1, 2008 (attached), on October 15, 2008 the City directed San Diego Gas and Electric (SDG&E) to commence construction on the L Street Undergrounding District from Monserate Avenue to Nacion Avenue. You were informed that NexHorizon would need to submit a Joint Trench Offer acceptable to SDG&E by October 15 in order to assure that NexHorizon's facilities within the L Street Undergrounding District would be installed underground.

Since that date, it is our understanding that your firm submitted a signed Joint Trench Offer by FAX on December 5, 2008. However, we understand that SDG&E requires an original signed Joint Trench Offer with design plans in order for it to be valid. Additionally, SDG&E has also informed us that you have not yet settled the outstanding financial issues on the Fourth Avenue Utility Undergrounding District, which is a requirement for acceptance of your Joint Trench Offer.

You should be aware that Section 15.32.160 of the Chula Vista Municipal Code states that, "it shall be unlawful for any person or utility company to erect, construct, place, keep, maintain, continue, own, employ or operate poles, overhead wires and associated overhead structures in the district on and after the date when overhead facilities are required to be removed by the resolution". The approximate date of pole removal was set at December 31, 2008 by Council Resolution on May 22, 2007. However, we have not been able to meet this date, initially because of the time required to approve the agreement to assign the cable franchise agreement to NexHorizon. After Council approval of this agreement on May 20, 2008, the City and SDG&E have been waiting for the submittal of a complete and acceptable Joint Trench Offer for L Street by NexHorizon.

In order to allow NexHorizon as much time as possible for compliance with this requirement, SDG&E has awarded the construction contract for the individual service laterals. However, since NexHorizon has been given ample opportunity to submit a Joint Trench offer acceptable to SDG&E, the City does not want any further delays in the construction process. SDG&E has submitted the main conduit undergrounding project to their scheduling staff on December 18,

2008. In order to participate in the Joint Trench, NexHorizon has until January 14, 2009 to submit a Joint Trench Offer acceptable to SDG&E. This includes resolution of any outstanding financial issues on the Fourth Avenue Undergrounding District that would affect SDG&E's acceptance of the Joint Trench Offer on L Street. Please work with SDG&E Governmental Liaison Planner, Dave Emerson, as quickly as you can. He may be reached at (858) 654-1136.

If NexHorizon has not complied with the above requirements by that date, your firm will need to provide its own trench and conduit installation if it still wishes to serve properties within the L Street Undergrounding District.

Please contact Elizabeth Chopp, Senior Civil Engineer, at (619) 691-5046 if you would like to discuss this issue.

**RICHARD A. HOPKINS  
CITY ENGINEER**

Cc: Calvin D Smiley and Daniel M. Smith, NexHorizon Communications Inc., 9737 Wadsworth Parkway, Westminster CO 80021 (certified mail)  
David J. Emerson, SDG&E, 8315 Century Park Court CP22A, San Diego CA 92123-1548  
Michael Meacham, Frank Rivera, Elizabeth Chopp

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-----Original Message-----

**From:** Emerson, David [mailto:DEmerson@semprautilities.com]  
**Sent:** Monday, August 18, 2008 3:19 PM  
**To:** Calvin D. Smiley  
**Cc:** Beth Chopp  
**Subject:** RE: L Street

Thanks for the heads-up Cal,

I'll let the City know where you are on these projects via this E-mail. I know they want to get construction going on the L St. conversion project as soon as possible.

*David J. Emerson*  
Governmental Liaison Planner - SDG&E  
[DEmerson@SemptraUtilities.com](mailto:DEmerson@SemptraUtilities.com)  
858-654-1136 (office)  
619-417-9577 (cell)

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**From:** Calvin D. Smiley [mailto:cdsmiley@nexhorizon.us]  
**Sent:** Monday, August 18, 2008 8:43 AM  
**To:** Emerson, David  
**Subject:** RE: L Street

I am expecting a call from my group today or tomorrow to provide me with the details. I will call you the moment I hear and discuss how we should move forward. I will also be speaking with Jeff Vaglio to get an update on the L Street design work.

**From:** Emerson, David [mailto:DEmerson@semprautilities.com]  
**Sent:** Friday, July 18, 2008 1:58 PM  
**To:** Beth Chopp  
**Cc:** cdsmiley@nexhorizon.us; Zumaya, Maria  
**Subject:** 4 th St. JTO  
Hi Beth,

I got your voice mail from earlier today. Attached is a PDF copy of the Joint Trench Offer we received from Chula Vista Cable for the 4th St conversion project. NexHorizon can use it as a template for L St. if they want.

The other attached PDF is a copy of 50% billing we sent to Chula Vista Cable (dated 8/13/2007) per the Joint Trench agreement, along with a letter from Vee Pitt to Cal Smiley regarding NexHorizon's position on this issue vis-a-vis their acquisition of Chula Vista Cable. To date, SDG&E has not received payment on this invoice. Since trenching is now complete, the remaining balance will be due once we send the As-built to Nexhorizon. This should happen in the next few weeks.

At this point, SDG&E has assumed ownership of the conduit system which was installed for Chula Vista Cable. We will release the ownership to NexHorizon when we receive full payment

Let me know if you have any questions. Thanks

*David J. Emerson*

Governmental Liaison Planner - SDG&E

[Demerson@SempraUtilities.com](mailto:Demerson@SempraUtilities.com)

858-654-1136 (office)

619-417-9577 (cell)

RESOLUTION NO. 2009-\_\_\_\_\_

RESOLUTION OF THE CITY COUNCIL OF THE CITY  
OF CHULA VISTA DIRECTING STAFF TO  
COMMENCE TERMINATION OF THE NEXHORIZON  
FRANCHISE

WHEREAS, NexHorizon has failed to meet certain material provisions of the Franchise Agreement, and after reasonable attempts to cure such provisions staff has executed the notice required to consider possible termination of the Franchise Agreement; and

WHEREAS, on or about August 18, 2009, staff provided NexHorizon with a detailed list of the material provisions within the Franchise Agreement that NexHorizon has failed to comply; and

WHEREAS, staff has worked diligently with NexHorizon and has provided it with every reasonable opportunity to satisfy its obligations under the Franchise Agreement prior to the public hearing; and

WHEREAS, NexHorizon has not cured its failure to comply with certain material provisions of the Franchise Agreement; and

WHEREAS, the City has not received Franchise Fee and Utility User's Tax payments for the current fiscal year and the total payments are estimated to be approximately \$60,000; and

WHEREAS, additionally, staff has invested resources in the development and bid implementation process for two (2) 20a utility under grounding projects; and

WHEREAS, these costs for these projects are recoverable through an allocation pursuant to the Public Utilities Commission and funded by local ratepayers; and

WHEREAS, the projects represent a value to the citizens of Chula Vista and to the extent the projects are not completed, costs increase or are duplicated by failure of the Franchise to meet the obligations in a timely fashion, the City would either absorb those costs or the project would not be completed and the community would not receive the benefit of their investment; and

WHEREAS, the City has complied with Section 3.c. of the Franchise Agreement, regarding termination of the Agreement.

NOW, THEREFORE, BE IT RESOLVED by the City Council of the City of Chula Vista that City staff is directed to commence termination of the Franchise Agreement between the City of Chula Vista and NexHorizon Communications Inc. for failure to comply with material provisions of the Franchise Agreement.

Presented by

\_\_\_\_\_  
Michael T. Meacham  
Director of Conservation and  
Environmental Services

Approved as in form by

\_\_\_\_\_  
Bart Miesfeld  
City Attorney